UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUNBELT RENTALS, INC.

Respondent,

and

Cases 18-CA-236643
18-CA-238989
18-CA-247528

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

Charging Party.

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS

Submitted by:

José A. Masini Torres
Assistant General Counsel
International Union of Operating Engineers
1125 17th Street, NW
Washington, DC 20036
(202) 778-2600
jmasini@iuoe.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUNBELT RENTALS, INC.

Respondent,

and

Cases 18-CA-236643
18-CA-238989
18-CA-247528

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

Charging Party.

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS

The International Union of Operating Engineers (IUOE) files this brief *amicus curiae* in response to the Notice and Invitation to File Briefs (Notice) issued by the National Labor Relations Board (NLRB or Board) on March 1, 2021. Addressing the Notice's first question, *Johnnie's Poultry*, 146 NLRB 770 (1964), was well-reasoned and correctly decided; it provides a long-standing and well-known bright-line rule that protects workers from coercion while allowing employers ample leeway to prepare a defense, is easy to apply and examine, is not onerous or difficult for employers to follow, and provides stability to labor law while producing reliable outcomes. Additionally, in response to both the Board's first and second question, even if it were warranted for the Board to review the *Johnnie's Poultry* rule this case, and its underlying facts, do not provide an appropriate vehicle for doing so because the case involves a confounding issue as to whether Respondent's counsel established a privileged, representational relationship with the two witnesses for whom the Administrative Law Judge found a *Johnnie's Poultry* violation. Accordingly, the IUOE urges the Board not to proceed with a review of the *Johnnie's Poultry* rule.

INTEREST OF *AMICUS CURIAE*

The IUOE is a labor organization that has nearly 400,000 members in approximately 110 Local Unions located throughout the United States and Canada, including the more than 10,000 members of IUOE Local 139, the Charging Party in the instant matters. IUOE Local Unions regularly appear before the Board as charging parties in cases where employers may seek to elicit testimony from employee-witnesses. The IUOE therefore has an interest in seeing that any questioning of employees it represents, or seeks to represent, by an employer preparing for trial is done in a voluntary and uncoerced setting.

The IUOE similarly has a strong interest in the efficiency of hearing proceedings. As knowledge of potential violations of the Board's *Johnnie's Poultry* doctrine generally arises organically during a hearing, the IUOE believes a simple, straightforward, bright-line rule best allows the General Counsel, or other interested parties, to quickly and efficiently elicit key facts that show, or fail to show, a *Johnnie's Poultry* violation, without distracting or sidetracking the hearing away from the central allegations of a case.

This brief is filed in furtherance of those interests.

RECORD FACTS

The facts of this case illustrate the simplicity and ease of a *Johnnie's Poultry* bright-line rule. Upon beginning cross-examination, counsel for the General Counsel almost immediately elicited testimony from witness Christopher Pender (Pender), a rank-and-file employee, regarding whether Pender received *Johnnie's Poultry* assurances from Respondent's counsel. (Tr. 1162-64) Cross examination revealed a confounding issue that Pender believed Respondent's counsel represented him in a personal capacity. (Tr. 1162-63) Cross examination further revealed that Respondent's counsel failed to advise Pender that Pender's participation was voluntary. (Tr. 1164)

Direct examination of another rank-and-file employee and Respondent witness, Mariano Rivera (Rivera), uncovered a similar situation as with Pender, but with the additional detail that Rivera affirmatively asked Respondent's counsel to represent him. (Tr. 1187) The Record is unclear on whether Respondent's counsel agreed to represent either individual and actually established an attorney-client relationship covering them in a personal capacity. In Rivera's direct examination, Respondent's counsel elicited an affirmative response to her question on whether she had indicated to Rivera that participation in her preparation was voluntary. She did not, however ask, or elicit any answers with regard to, whether she explained the nature of the questioning and advised Rivera that his participation, or lack thereof, would not be met with reprisals. (Tr. 1187) During cross-examination, counsel for the General Counsel elicited negative responses from Rivera regarding whether Respondent's counsel explained the nature of the questioning and whether she advised him that his participation, or lack thereof, would not be met with reprisals. (Tr. 1191)

These two instances demonstrate the current bright-line *Johnnie's Poultry* rule is straightforward and efficient to assess at hearing, and only requires asking a limited, succinct questions that can be done at the beginning or end of an examination. Nonetheless, these instances also show – and the Board's call for briefs did not acknowledge – that the particular facts of this case do not lend themselves to a reexamination of *Johnnie's Poultry* because there is a confounding issue, without sufficient detail in the record, as to whether Respondent's counsel, notwithstanding potential ethical pitfalls, established an attorney-client relationship with Pender or Rivera.

ARGUMENT

I. The *Johnnie's Poultry* rule should remain as presently constructed and applied because it provides a straightforward, bright line rule that is judicially efficient, protects workers, and is not burdensome to follow.

The *Johnnie's Poultry* rule has gone untouched for nearly 60 years. The rule deems it unlawful for an employer to interview an employee in the course of preparing its defense for an unfair labor practice proceeding, unless: (1) the employer informs the employee of the purpose of its questioning, assures the employee no reprisals will take place, and that participation in the interview is voluntary; (2) the employer conducts the questioning in an uncoercive manner and environment, free of hostility towards Section 7 rights; and (3) the interview does not exceed the necessities of its otherwise legitimate purpose by delving into other matters, such as union organizing, eliciting information about the employee's subjective state of mind, or otherwise interferes with the employee's statutory rights. *Johnnie's Poultry*, 146 NLRB at 775. Multiple Circuit Courts have agreed with and enforced the Board's doctrine. Those Circuit Courts recognized, for example, the chilling effect on Section 7 rights posed by unlawful questioning where *Johnnie's Poultry* assurances had not been offered and followed. *See, e.g.*, *Montgomery Ward & Co. vs. NLRB*, 377 F.2d 452, 456 (6th Cir. 1967), *Retail Clerks Int'l Ass'n, AFL-CIO v. NLRB.*, 373 F.2d 655, 657-58 (D.C. Cir. 1967), *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133 (4th Cir. 1982). The D.C. Circuit has further noted the importance of balancing Section 7 rights with an employer's need to prepare a defense, while acknowledging the need for safeguards to prevent coercive questioning. *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818, 826 (D.C. Cir. 1970).

Johnnie's Poultry assurances are not only vitally connected to Section 7 rights, they are clear and uncomplicated. Their straightforward application ensures that any employer and its

counsel can easily comply with the rule with the most minimal of effort. So well-understood and uncomplicated is compliance with the *Johnnie's* Poultry rule, that one can find readily available samples – usually the length of a brief paragraph – of sample assurances that satisfy the rule, and that can be adapted to whatever the context. One such example is:

> As the company attorney, I would like to talk to you about certain charges made to the EEOC. You have the right to talk to me or not to talk to me. Whether you talk to me or refuse to talk will have nothing to do with your employment. Your participation is completely voluntary. If you choose to talk to me, you will receive no benefit or reward. If you refuse to talk to me, you will not be reprimanded, disciplined, or receive any adverse job action. Do you understand your rights? Do you want to talk further? 63 Am. Jur. Trials 127 (Originally published in 1997)

Therefore, in addition to ensuring workers are protected from coercive questioning ahead of a hearing, employers gain clear guidance on what they can and must do, and the peace of mind of knowing with a high degree of certainty whether they have complied with Board law.

Moreover, any burden imposed is less than what the Supreme Court already imposes on parties through its requirement of *Upjohn* warnings. In *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981) the Supreme Court determined that when an attorney representing a corporate entity is interviewing a company employee, in order to avoid any confusion as to the nature of the attorney-client privilege involved and its application, an attorney must caution an employee that in addition to representing the company and not the witness, that attorney: (1) has been retained for the purpose of gathering information and providing legal counsel to the company, whom it represents; (2) the fact-gathering is protected by attorney-client communications and work-privilege; (3) the privilege belongs to the company, not the witness, and the company retains full discretion on whether to waive that privilege; and (4) the witness must keep the interview and what is discussed private and confidential. While the Supreme Court's *Upjohn* warnings are more numerous than those of *Johnnie's Poultry* they are similarly straightforward, bright line, and not burdensome. In

this sense, the Board may be complicating the issue by focusing on specific facts, such as that the two relevant witnesses appeared to be aligned with the Respondent; the Board even noted how one had filed a decertification petition and the other was a former manager. The simplicity and consistency in both the application, and examination, of *Johnnie's Poultry* assurances, like *Upjohn* warnings, are that neither an employer, nor a court, has to delve into a witness's leanings, an inquiry that reduces the efficiency of the hearing inquest by requiring extensive litigation within litigation, and potentially strays into protected Section 7 information.[1] Although the origins and purposes of *Upjohn* warnings and *Johnnie's Poultry* assurances are not identical, they share an intent to provide transparency and clarity to a witness, clear guidance to employers, and efficiency to courts. And, in the case of *Johnnie's Poultry* warnings, they also protect witnesses from examinations that may not only impact their Section 7 rights, but may also produce inaccurate and unreliable testimony if a witness is questioned under coercive circumstances.

Additionally, the simplicity and straightforwardness of the rule make it easy to examine any failure in compliance at hearing. As evidenced in the record, counsel for the General Counsel, in approximately just five pages of testimony, elicited from two separate witnesses whether they had been given the necessary *Johnnie's Poultry* assurances. The succinct and bright line nature of the *Johnnie's Poultry* rule allowed counsel for the General Counsel's examination to be efficient and brief, without distracting from the underlying matters in the complaint that resulted in the hearing. The responses from witnesses to such questions will, in many cases, be generally

[1] Likewise, as the Board has also noted in other contexts, an employee's leanings and support might change, and thus prior pro or anti-union acts merely capture a witness's then potential leanings. The *Johnnie's Poultry* bright line rule has the virtue of greater efficiency, ease of compliance, and protection from coercion, while sparing both employers and courts from a complicated analysis of multiple subjective factors, including when and whether a witness supported a union, in order to determine whether questioning was unlawful.

straightforward: for example, either they received the necessary assurances or they did not. Only a limited subset of cases may require delving into further details about the questioning involved and its manner. As was the case here before the Board's Notice and Invitation, this all in turn can make it relatively uncomplicated for an Administrative Law Judge to determine whether an employer violated the Act, without often requiring extensive briefing on the issue, or a lengthy section of the Administrative Law Judge's decision.[2]

These reasons demonstrate why the *Johnnie's Poultry* assurances have been in place as long as they have without substantial challenge at the Board level. They safeguard Section 7 rights while still allowing employers to adequately prepare their defense for trial within a clear and reasonable legal compliance framework that is straightforward to follow and to enforce. The Board should thus preserve the *Johnnie's Poultry* framework, which inures to the benefit of both employees and employers.

II. Maintaining the *Johnnie's Poultry* rule provides stability and consistency to labor law.

As stated earlier the Board has maintained the *Johnnie's Poultry* rule, undisturbed by neither Republican nor Democratic appointed Boards, for nearly 60 years. To that effect, the rule is widely known among management labor counsel, and it is well understood and publicized. At the core of *Johnnie's Poultry* is a plain requirement that an employer inform a witness of their legal rights and issue them an affirmative assurance that they will respect those rights and comply with the law. The *Johnny's Poultry* rule is also not unique; there are other areas where the Board

[2] This very case demonstrates the efficiency of the *Johnny's Poultry* framework; the *Johnny's Poultry* violations alleged therein were sufficiently distinct from the case in chief that the Board seamlessly severed the rest of the case and issued a decision while addressing the *Johnny's Poultry* matter separately.

analogously applies bright line rules or requires parties to provide to employees, or other parties, affirmative assurances of legal compliance. Hence any alteration of the *Johnnie's Poultry* rule inherently risks inconsistency and instability in labor law, whether any replacement rule creates a more onerous or fact intensive inquiry or whether the Board does away with any and all requirements that employers give assurances and ensure an uncoercive environment.

Although, to be clear, the Board would almost necessarily have to replace *Johnnie's Poultry*'s assurances with some other test for whether an employer's interrogation was unlawful, rather than simply overrule and do away with *Johnnie's Poultry*. The very circuit court decisions the Board cites in its invitation for briefs – *NLRB v. Monroe Tube Co., Inc.*, 545 F.2d 1320 (2d Cir. 1976) *A&R Transport Inc. v. NLRB*, 601 F.2d 311 (7th Cir. 1979) *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245 (5th Cir. 1992), *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880 (8th Cir. 2018) – do not hold that interrogation of an employee in preparation of an unfair labor practice defense is inherently lawful, but rather set forth differing standards for determining whether such questioning is unlawful, including advocating for a totality of circumstances test or, as in the case of the Second Circuit, applying "fairly severe standards" identified as *Bourne* factors. *See Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). When these circuit court decisions are taken in concert with circuit court decisions that have upheld the *Johnnie's Poultry* test - such as *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB***,** 691 F.2d 1133 (4th Cir. 1982) (enforcing the Board's application of the per se rule) and *Amalgamated Clothing Workers of Am. v. NLRB***,** 424 F.2d 818, 825 (D.C. Cir. 1970) (reciting the *Johnnie's Poultry* safeguards with approval) – it is apparent that circuit courts believe a test should exist but disagree as to what that test should be. It is then possible, even likely, that any test that replaces *Johnnie's Poultry* will result in circuits courts being

split on enforcement, or that if the Board decides there should be no rule and no assurances, that too will be met with disapproval by at least some circuit courts.

The Board also risks an inconsistent approach to circuit court splits, and one that implies the Board approaches such splits selectively. For example, in its Election Protection Rule regarding proof of majority support in construction industry collective bargaining relationships, the Board primarily relied on the D.C. Circuit's disapproval of the *Staunton Fuel* test as the basis for implementing a new rule. However, and as noted above, in the case of the *Johnnie's Poultry*, the D.C. Circuit has expressed approval for the rule but the Board instead turned to other circuits, those that had not enforced *Johnnie's Poultry*, as the basis for its Notice and Invitation. The Board's approach in this case risks creating the impression that the Board will selectively cite to disapproving circuit courts that share the Board's underlying desire for a change in Board law as a justification for changing long-standing Board principles.

Finally, a change in doctrine would likely lead to a more fact-intensive and subjective inquiry, and therefore less consistency in the application of Board law and case outcomes. Presently, in two to three sentences, an employer can comply with the *Johnnie's Poultry* rule and, with similar simplicity, the Board can assess whether an employer complied with the rule or not. However, if the Board begins to also assess subjective factors such as whether an employee had union or management leaning tendencies, whether they felt coerced by the circumstances, or whether or not they believed they might be subject to repercussions, it risks not only broaching upon Section 7 protections, but would require of parties that they engage in highly specific factual analyses and sidebar litigation at a hearing. Besides distracting from the underlying matters at a hearing, such a fact-intensive review would result in more factual appeals to the Board, and therefore a greater variance in case results, and a correspondingly diminished ease for parties to

consistently know whether they have acted in compliance with Board law when interviewing witnesses in preparation for hearing.

Labor law benefits when there is a well-known rule that produces consistent and generally predictable outcomes. *Johnnie's Poultry* provides one such set of rules, and the alternatives to it require more onerous, and less consistent compliance, and a wider range of less predictable outcomes. For this reason, the Board should not replace the *Johnnie's Poultry* rule, notwithstanding some, but not all, circuits having alternative frameworks.

III. Even assuming a change in the *Johnnie's Poultry* doctrine is appropriate and necessary, the underlying facts of this case make it a poor vehicle for doing so.

The underlying facts in this case make it a poor vehicle to use in overturning precedent, particularly a precedent that has been in place for the better part of the Board's history. As Chairman McFerran's dissent in the Notice and Invitation to File Briefs points out, it is not at all clear that Respondent even asked the Board to overturn *Johnnie's Poultry*. Respondent does point out Seventh Circuit precedent regarding *Johnnie's Poultry* and the fact that it applies a "totality of the circumstances" approach. (Respondent's Brief at p.9) But Respondent does not explicitly ask for the Board to adopt this test, and merely points it out to highlight the difficulty in obtaining enforcement of a Board decision.

Moreover, there are unique facts in this case that make its circumstances fall outside the regular ambit *Johnnie's Poultry* is intended to cover. Both Pender and Rivera testified to some extent they believed Respondent's counsel was their counsel. Pender referred to Respondent's counsel as "my lawyer." (Tr. 1162) Rivera similarly indicated that he wanted Respondent's counsel to represent him. (Tr. 1187) The record is unclear, and neither Respondent's questioning at hearing nor Respondent's brief provided any clarity, on whether Respondent's counsel actually

formed an attorney-client relationship, even if one worthy of scrutiny under the American Bar Association's Model Rules of Professional Conduct, Rule 1.7 on Conflict of Interest, or whether Respondent's counsel never actually formed a representational relationship with Pender and/or Rivera and Respondent's counsel did not take steps to clarify Pender and/or Rivera's understanding of the relationship.

The *Johnnie's Poultry* rule exists to mitigate the risk of coercion of an employee's Section 7 rights while allowing an employer to be able to adequately prepare its defense. *Johnnie's Poultry*, 146 NLRB at 774. It is not a rule specifically meant to apply to instances where an employee and an employer's counsel mutually and voluntarily agreed to establish an attorney-client relationship. Such a relationship, while perhaps uncommon, would make the issue of coercion a much more nuanced question. It is not clear from the record, however, whether Respondent and the two mentioned witnesses established a privileged relationship, and thus whether these are really the types of circumstances *Johnnie's Poultry* sought to address, though Respondent fails to garner the benefit of the doubt as to a defense of privilege because, having had ample opportunity to do, Respondent's counsel did not elicit testimony that would clarify the matter.

On the other hand, these very circumstances show the benefit of a rigid, bright line rule and application. Rather than have to contend with incomplete or ambiguous records, novel questions, nd a litany of potential, case-specific factual issues, it is far more efficient and beneficial to have the present *Johnnie's Poultry* rule: in this case, either Respondent gave the adequate assurances or it did not and, because it failed to do so, additional details unnecessarily complicate the inquiry without a comparable benefit. Thus, the facts of this case, if anything, provide support for preserving the *Johnnie's Poultry* rule, and do not provide a solid foundation from which to revoke it and install another, more variable rule in its place.

Whether because the lack of clarity regarding certain critical facts of this case demonstrate the benefit of a more rigid and straightforward framework governing the questioning of employees by employers preparing a defense, or because the facts of the case raise doubt as to whether it is really representative of the intent behind *Johnnie's Poultry* assurances, this case is a poor vehicle for revising such longstanding case law, and the Board should instead preserve *Johnnie's Poultry*.

CONCLUSION

The Board should allow the *Johnnie's Poultry* rule to continue undisturbed as it properly protects Section 7 rights while providing employers an uncomplicated and unoppressive framework that balances those Section 7 rights with employers' interest in preparing their response to unfair labor practice allegations, as well as provides the Board with an efficient rule it can assess on the record with minimal fear of sidelining the principal allegations of a case through a more extensive and fact-intensive inquiry. Moreover, the Board should not use this case as vehicle for any revisions to its *Johnnie's Poultry* rule as the case contains an uncommon set of facts, some of which remain ambiguous, and which in any case only provide further support to the Board's current bright line rule.

Dated: April 19, 2021

Respectfully submitted,

/José A. Masini Torres/

José A. Masini Torres
Assistant General Counsel
International Union of Operating Engineers
1125 17th Street, NW
Washington, DC 20036
(202) 778-2611
jmasini@iuoe.org

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2021, I served, via email, an electronic copy of the Brief Amicus Curiae of the International Union of Operating Engineers on the parties listed below:

Patrick N. Ryan
Baum, Sigman, Auerbach & Neuman, Ltd.
pryan@baumsigman.com

Yash B. Dave
Smith Gambrell & Russell LLP
ydave@sgrlaw.com

Patricia Hill
Smith Gambrell & Rusell LLP
pjhill@sgrlaw.com

Ian Jones
Smith Gambrell & Rusell LLP
ijones@sgrlaw.com

Jennifer A. Hadsall
Regional Director
Jennifer.hadsall@nlrb.gov

Benjamin Mandelman
Officer in Charge
benjamin.mandelman@nlrb.gov

Tyler J. Wiese
Field Attorney
tyler.wiese@nlrb.gov

Respectfully submitted,

/José A. Masini Torres/

José A. Masini Torres
Assistant General Counsel
International Union of Operating Engineers
1125 17th Street, NW
Washington, DC 20036
(202) 778-2611
jmasini@iuoe.org

.